for The Defense

The Training Newsletter for the Maricopa County Public Defender's Office

Volume 2, Issue 8 -- August 1992

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Representing Juveniles in Adult Court: Making Effective Use of Juvenile Court Materials

By Anne-Rachel Aberbach

Wouldn't it be nice if our cases came to us pre-investigated, the witnesses already interviewed, our clients already examined by psychological experts, relevant documents already subpoenaed? If your client is a juvenile who was transferred to adult court, your case should look that way when it gets to you. The purpose of this article is to make you aware of the kind of work product that should be included in the juvenile file, so that you can use the material effectively in adult court.

The easiest way to explain the scope of materials you can expect to find in the juvenile file is to explain how we prepare for transfer hearings. Transfer hearings have two phases: the probable cause phase, and the transfer phase. Rule 14(a), Arizona Rules of Procedure for the Juvenile Court. During the probable cause phase, the judge must decide whether there is probable cause to believe that a crime was committed and that the juvenile committed it. Id. at Rule 14(b). The probable cause phase is conducted in accordance with the rules governing adult preliminary hearings (Rule 5.3 and 5.4(c), Arizona Rules of Criminal Procedure). Id. Thus, hearsay evidence and illegally seized evidence are admissible. Similarly, the juvenile has no automatic right to put on evidence at the probable cause phase, but may make an offer of proof. Contrary to preliminary hearings, we have approximately thirty days to prepare for the transfer hearing. This is usually enough time to do a fairly thorough investigation of the case.

If the judge finds probable cause, the transfer phase of the hearing takes place. During the transfer phase, the judge must determine whether the public safety or interest would best be served by the transfer of the juvenile for criminal prosecution. Id. at Rule 14(c). The juvenile may present any evidence relevant to that determination. The court also considers the reports of a psychologist and a juvenile probation officer in making the decision. These reports are prepared for every juvenile facing transfer to adult court. The probation officer's report is required by statute. Id. at Rule 12(b). The psychologist's report may be ordered at the discretion of the court, but, in practice, it is always ordered. Id. at Rule 12(c).

Preparing for the probable cause phase of a transfer hearing is just like preparing for a trial. You can expect to find the following information related to probable cause in the juvenile file:

1. The juvenile court petition and request for transfer filed by the county attorney. These documents list the charges for which transfer is requested. Any amendments to the charges will also be in the file.

2. All police department reports related to the incident. Frequently, the county attorneys do not provide us with all relevant reports in a timely fashion. To combat the problem, we may subpoena the reports directly from the police department and/or question the lead officer at the transfer hearing about the number of existing reports related to the incident.

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3. Any pleadings, motions, and minute entries related to pre-hearing matters. Most of these are not of a substantive nature since illegally seized evidence and hearsay are admissible at the transfer hearing. The file will also contain the court's minute entry ruling on the transfer hearing. It is important to check the court's findings against the original charges on the petition. Frequently, the court finds probable cause with respect to some charges but not others, or finds probable cause of a lesser-included offense but not on the higher charge. Although recent appellate rulings seem to hold that once a juvenile is transferred on any charge, the county attorney may seek indictment on other related charges, it is important to be aware of how the juvenile court judge ruled with respect to each charge.

4. A profile generated by the juvenile court computer system listing all of the juvenile's prior referrals to juvenile court and the disposition of those referrals. The profile contains other valuable information, such as the juvenile's accomplices on each referral.

5. Any tape recordings relevant to the case (e.g., police department tape recordings of 911 calls or radio traffic between police officers and the dispatcher). If the charges relate to a school-related incident, there may be a due process hearing tape.

6. Witness interviews. The witness interviews should be on tape, and the most important interviews will be transcribed.

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7. A summary of the juvenile's explanation of the charges, including a list of potential defense witnesses and their anticipated testimony.

8. Investigator reports. Frequently, investigators prepare written reports in response to a request for investigation. The reports may include photographs of the crime scene or other real evidence, diagrams, or other evidence developed to aid the defense.

9. Documents subpoenaed by the defense. There are many types of documents which may be subpoenaed to aid in the preparation of the defense. These may include documents related to the juvenile or to other witnesses. For example, if the offense took place at the Adobe Mountain Juvenile Institution, there are incident reports generated by security at Adobe, and separate reports generated by the internal affairs division of the state Department of Youth Treatment and Rehabilitation. If the incident took place at a school, there are disciplinary reports and due process hearing tapes. If the incident involved physical injury to the juvenile or the victim, or if a medical or mental condition is part of the defense, doctor and hospital records may be subpoenaed. Often, the school disciplinary records of opposing juvenile witnesses will be subpoenaed to use in cross-examination.

10. Miscellaneous information. The file will also contain miscellaneous materials, such as all subpoenas, correspondence, and attorney notes. Although it may be tedious work, hand-written attorney notes should be read carefully. They frequently contain important information.

Because the juvenile is permitted to introduce evidence of amenability to treatment at the transfer phase of the hearing, the juvenile file may be a gold mine of mitigation evidence. This type of evidence may help you get a better plea offer for your client, or may help you get your client into a program as an alternative to prison. At the very least, the information should help you prepare for the sentencing hearing. You can expect to find the following information related to the transfer issue in the juvenile file:

1. The probation officer's report regarding transfer. This is a useful document to give you some background information on the juvenile and the juvenile's family. It contains biographical information on the juvenile and the family; a summary of the presenting referral and the juvenile's prior referrals to the juvenile court; a summary of the juvenile's history in the family, school, and the community; a summary of the treatment the juvenile received in juvenile court; and a recommendation regarding transfer. The accuracy of the biographical information and information on such topics as drug and alcohol use cannot be relied upon since the juvenile is frequently the source of the information. All information should be verified with the juvenile and the family.

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FOR THE DEFENSE

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

2. The psychologist's report regarding transfer. This report is prepared by a psychologist after testing and interviewing the juvenile. It provides background information on the juvenile and the juvenile's family; an assessment of the juvenile's mental condition; a summary of the test results; a diagnosis; and a recommendation regarding transfer. The report may be useful in several ways. For example, the report may explain how the juvenile's background, mental condition, medical condition, or learning disability may have contributed to the commission of the offense. Or, the report may explain the type of treatment that would benefit your client, and help you get your client into an appropriate program. If the initial transfer report is favorable, and substantial time passes between the preparation of the transfer report and a sentencing hearing in adult court, you may want to have your client re-examined by the same psychologist to provide favorable testimony in adult court.

3. Occasionally, if the court-appointed psychologist prepares an excessively negative report, we may have the juvenile re-evaluated by another expert. In such a case, the other expert's report will be in the file.

4. Because the probation officer summarizes all prior offenses in the probation report, we review all the departmental reports relating to those offenses. Those reports will be in the file and may assist you in some way (for example, by revealing a certain pattern to the offenses).

5. All prior psychological or psychoeducational reports and all prior probation officer reports. These reports are retrieved from the juvenile court computer and are very useful. Prior reports may identify your client's treatment needs. You can examine subsequent reports to see if the treatment was received. Frequently, juveniles do not receive adequate treatment for their psychological and educational needs. Reviewing all of the old reports will also give you a better sense of your client's history.

6. Incident reports can also be retrieved from the juvenile court computer. These reports are generated every time there is an incident involving a juvenile in a county detention facility. These reports may indicate that your client was aggressive toward staff or another juvenile, or that your client was the victim of aggression. The reports will also be generated if the juvenile is a suicide risk. Again, you can get a better sense of your client by reviewing these reports.

7. Residential placement reports. If the juvenile spent time in a residential placement, progress in the placement will be reported somewhere. Currently, residential placements are required to submit a written report to the court on a regular basis. Formerly, probation officers summarized progress in placement in their reports. Frequently, juveniles are retested and reassessed for their needs in placement, or treated by psychiatrists or psychologists. These records may be in the juvenile's file.

8. Other types of records may be subpoenaed on a case-by-case basis. For example, school attendance and disciplinary records may be used to demonstrate a juvenile's educational achievements or educational needs. If a previous mental condition or physical ailment is reported, the relevant hospital or doctor's records will be subpoenaed. If the juvenile was ever a ward of the Arizona Department of Youth Treatment and Rehabilitation, numerous records are available. These include health records, educational records, and general records (behavior in the facility as reported by the case manager, behavior on parole as reported by the parole officer, etc.). Each of these categories of records must be subpoenaed separately.

9. Character witness materials. Often character witnesses are interviewed in preparation for the transfer hearing. The file usually contains notes on character witness interviews and may also contain character witness letters submitted to the court. Character witnesses often include teachers, employers, athletic coaches, religious officials, parole officers, case managers, counselors, and other responsible adults.

Perhaps the most useful item generated in juvenile court is the transcript of the transfer hearing itself. It is sworn testimony which can be used for several purposes. The most obvious use of the transfer hearing transcript is to impeach witnesses in adult court. But the transcript can also be used as a basis for remanding a case for a new determination of probable cause. If the state fails to present evidence to the grand jury that was developed during the transfer hearing, the failure to present the evidence may amount to the deprivation of a substantial procedural right, and may provide a basis for remand.

Because the juvenile is permitted to introduce evidence of amenability to treatment at the transfer phase of the hearing, the juvenile file may be a gold mine of mitigation evidence.

Due to the cost, not all transfer hearing transcripts can be ordered. The following issues should be considered in deciding whether or not to order a transcript:

1. Does the juvenile court attorney think the transcript is necessary to represent the juvenile adequately in adult court? If so, the attorney's opinion should be given deference since the attorney was present at the hearing.

2. Who testified at the probable cause phase of the transfer hearing? Sometimes, for a variety of strategic reasons, the juvenile will waive the probable cause phase of the hearing. If that phase of the hearing is waived, the transcript may not be needed. If the state puts on its case through the use of hearsay testimony, and the officers merely repeat material contained in the police reports, it may not be necessary to order the transcript. However, if testimony is developed during cross-examination that may be used for impeachment, or that should, in fairness, go to the grand jury, the transcript should be ordered. If witnesses testify in person, and their testimony should go to the grand jury, or may be used for future cross-examination, the transcript should be ordered.

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3. Who testified at the transfer phase of the hearing? Usually the testimony during the transfer phase of the hearing relates to amenability to treatment, and not to guilt or innocence. Thus, a transcript of the transfer phase testimony may not be necessary. Occasionally, the testimony will relate to guilt or innocence. For example, there may be testimony to support a self-defense argument or an insanity defense. In such a case, the transcript should be ordered.

Two other points about transcripts bear mention. First, you may order portions of transcripts to reduce cost. You may want to order the testimony of only one or two witnesses, or just the cross-examination of a witness. Second, some cases may be so important that you will want to order the co-defendant's transfer hearing transcript. To obtain juvenile court transcripts you need a court order from the presiding juvenile court judge permitting release of the transcript.

Hopefully, this article will help you make effective use of juvenile court materials in your adult court practice. But nothing can take the place of meeting personally with the juvenile court attorney to discuss your client's case. Please call us when you are assigned a case involving a juvenile transferred to adult court. We will be happy to review the case with you and to show you what has already been done. This should make your job easier and improve the quality of representation for our clients. ^

Editor's Note: This article was prepared to encourage trial attorneys to obtain and thoroughly review all clients' files generated by our Juvenile Division. All files may not be as complete as the author describes; however, all practitioners in Juvenile and supervisory personnel are striving to achieve the highest quality of representation of our clients. Most files will contain some or all of the information suggested by Anne. Additionally, juvenile attorneys are an excellent resource to discuss cases with because of their familiarity with the facts, the client, relatives and other important factors to be considered in reaching the best benefit for the client.

Amendments to Victims' Rights Legislation to Affect Practice

Although major changes to the criminal code were vetoed by the governor, significant changes to Arizona's victims' rights legislation were enacted and signed into law. The amendments become *effective September 30, 1992.*

House Bill 2262 was introduced as legislation to "clean up" issues in 1991 Victims' Rights Implementation Act (VRIA) that proved unworkable for the courts and prosecutors. Some of the amendments, however, have a substantial impact on our practice.

Redefining "Victim"

The most significant change is the definition of a "criminal offense" as provided in A.R.S. Sec. 13-4401. For purposes of the VRIA, a "criminal offense" will now mean "*conduct that gives a peace officer or prosecutor probable cause to believe that a felony or that a misdemeanor involving physical injury, the threat of physical injury or a sexual offense has occurred.*"

The new definition will narrow the scope of the VRIA and eliminates most municipal court and many justice court victims' rights notification requirements. For example, an alleged victim of misdemeanor criminal trespass, at least according to the VRIA, will not be entitled to the protection of victims' rights. Juvenile matters remain exempt from all victims' rights provisions.

Practitioners should note, however, that the VRIA definition conflicts with present Rule 39 and the constitutional amendment establishing victims' rights. Despite, the present conflict with court rules and the constitution, the legislature was compelled to narrow victims' rights in lieu of the unprecedented financial impact victims' rights has had on the criminal justice system. A committee, which includes members of our office, has been formed by the supreme court to suggest conforming changes to court rules.

Fewer Misdemeanor Victims' Rights Assessments

Similarly, the amendments to the VRIA now clarify which Title 28 offenses are subject to the $25.00 misdemeanor assessment imposed under A.R.S. Sec. 13-812. That statute was amended last year to provide a $25.00 assessment for misdemeanors, excluding "traffic offenses" to fund victims' rights.

Previously, city courts were severely impacted by the large number of offenses subject to the victims' rights assessment. Practitioners should be aware, however, that the $25.00 assessment will still be assessed on all misdemeanor DUI offenses and several other more serious Title 28 violations.

Interviews of Alleged Victims

Two amendments, suggested by our office, were adopted to clarify interviews of alleged victims. Amendments to A.R.S. Sec. 13-4433, as provided in new sub-section F, remove "peace officers" from having the right to refuse to interview with a defense lawyer, if they become a victim while acting in their official capacity. Peace officers, however, will still be entitled to all other victims' rights provisions.

The changes were agreed to because legislators were convinced, by public defender arguments, that some prosecutors were using victims' rights legislation as a shield to refuse an interview of an arresting officer. In one case, several police officers arrested an individual accused of several offenses, including resisting arrest, and then prohibited all interviews. Additionally, legislators reasoned that many of the public policy arguments used to justify an alleged victim's interview refusal rights simply were inapplicable to law enforcement officers who are trained to write reports and give interviews.

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Additionally, the new legislation adds the word "initiate" to A.R.S. Sec. 13-4433(B). This small, but significant, change is intended to clarify the ability of defense attorneys to talk with alleged victims that contact them. Hence, if an alleged victim calls a public defender to discuss a case, the attorney need not have the contact channelled through a prosecutor.

A "criminal offense" will now mean "conduct that gives a peace officer or prosecutor probable cause to believe that a felony or that a misdemeanor involving physical injury, the threat of physical injury or a sexual offense has occurred."

This change was agreed to because many alleged victims are the friends, siblings, parents or another relatives of the accused. Often they wish to discuss the case with defense counsel or offer information pertinent to the accused's defense even if they are the alleged "victim". Some defense attorneys cautiously took the position that they could never talk with an alleged victim unless it was through the prosecutor's office.

Liability

Previously, legislation contained in A.R.S. Sec. 13-4437(B) provided that individuals could be liable for intentional or knowing violation of victims' rights. Amendments this year eliminate individual liability, however, and add that a governmental agency that is "grossly negligent" may be liable for a victim's rights violation of a court rule, legislation or the constitution. This provision is intended to put the burden on governmental agencies to see that employees are provided appropriate training on the requirements of victims' rights. A grossly negligent violation, subject to existing common law immunities, may give a victim a way to be compensated for the abuse.

Miscellaneous

Other amendments:

* Clarify that an appointed victim's representative under A.R.S. Sec. 13-4403, who is not a *bona fide* witness, may exercise the same rights as the victim, including the right not to be interviewed. No definition, however, is provided for a *bona fide* witness.

* Give trial courts the discretion to allow a minor's representative to discuss the case with the alleged minor victim if it can be shown that it is in the *"best interests of the minor"*. Previously, A.R.S. Sec. 13-4403 prohibited the minor's representative from discussing the facts of the case with the minor victim.

* Require prosecutors to discuss "turn downs" with alleged crime victims. According to A.R.S. Sec. 13-4419, prosecutors, upon the request of an alleged victim, must not only confer with an alleged victim but also discuss the case if a *"decision not to proceed"* has been made. This amendment may mean alleged victims will convince prosecutors to re-file. Defense attorneys may want to discover, in all cases involving victims, whether it was originally a "turn-down".

* Prohibit victims from seeing a court-ordered redacted portion of a presentence investigation.

* Add that victims not only have the right to be present at a presentence hearing, but also to be heard.

* Provide that the trial courts cannot accept a plea agreement unless reasonable efforts were made to give victims notice of the right to be present and heard. Further, if the victim is not present, requires the prosecutor to advise the court, to the best of his knowledge, that notices were sent to the victim. The prosecutor must also advise the court of the victims' views, if known.

* Limit the crime victim advocate's duty to inform the defense of information obtained from alleged victims to only that which is discoverable.

* Require prosecutors to tell alleged victims that they can petition the court to revoke an accused's release.

In general, practitioners should remain aware that court rules and the constitutional provisions relating to victims' rights conflict with legislation. In many instances, legislation exceeds the constitutional amendment, and in other areas it may actually narrow the scope, unconstitutionally, of victims' rights. The inconsistencies are fertile ground to exploit on behalf of our clients to insure them due process of law.

Please forward any significant motions challenging victims' rights to the Maricopa County Public Defender's Office -- Training Division. **CJ ^**

A Summary of the Changes in DUI Laws

By Gary Kula

Once again, a number of changes have been made to the DUI and DUI-related laws during the past legislative session. The purpose of this article is to provide you with a brief summary of some of the more significant changes which may impact your practice in the area of DUI defense. Unless otherwise noted, these changes will take effect September 30, 1992.

Commercial Drivers

The implied consent law will now apply to drivers of commercial motor vehicles with a BAC of 0.04 or more. (A.R.S. Sec. 28-691(B)). A new criminal offense has been created whereby it will be unlawful for a person with an alcohol concentration of 0.04 or more to drive or be in actual physical control of a commercial motor vehicle. (A.R.S. Sec. 28-692(A)(4)). Separate statutory presumptions pertaining to BAC have been established for this offense. (A.R.S. Sec. 28-692(N)). The administrative per se license suspension provisions will apply to commercial vehicle operators with BACs of 0.04 or more. (A.R.S. Sec. 28-694(A)). (SB 1087, HB 2132).

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Minors

The implied consent provisions have been extended to individuals who have been arrested for a violation of Sec. 4-244(34) (unlawful for a person under the age of 21 to drive a vehicle while there is any alcohol in their body). The officer must have reasonable grounds to believe that the driver is under 21 years of age, and has spirituous liquor in their body. (A.R.S. Sec. 28-691(A)). In the event that the minor takes the breath test, the admin per se license suspension provisions will apply only if the BAC test result is 0.10 or more. (A.R.S. Sec. 28-694(A)). [Note: Actually, it appears that the legislative intent was to impose an admin per se suspension if the minor's test result indicated the presence of any alcohol. The language in the amendment to A.R.S. Sec. 28-694, however, does not express that intention. Hence, you have the end result that drivers under the age of 21 impliedly consent to blood alcohol testing if the officer has reasonable grounds to believe that there is alcohol in their body, yet no admin per se suspension can be ordered unless the minor's BAC is 0.10 or more.] (HB 2132).

Affirmative Defense

The statute now reads: "If a defendant produces some credible evidence that his blood alcohol concentration at the time of driving or being in actual physical control of a vehicle was below 0.10, the state must prove beyond a reasonable doubt that the defendant's blood alcohol content was 0.10 or more at the time of driving or being in actual physical control of a vehicle." (A.R.S. Sec. 28-692(B)). (HB 2132).

Statutory Presumptions

The presumptions may now be given based upon the defendant's BAC within two-hours of the time of driving or being in actual physical control. (A.R.S. Sec. 28-692(E)). (HB 2132).

Second Samples

The new statute reads: "If a law enforcement officer administers a duplicate breath test and the person tested is given a reasonable opportunity to arrange for an additional test pursuant to subsection H of this section, a sample of the person's breath does not have to be collected or preserved." (A.R.S. Sec. 28-692(G)). (HB 2132).

Admissability of Records

This new statute provides for the admissability of computer-stored records concerning quantitative breath testing devices. Issues concerning signatures and certification requirements are also discussed. (A.R.S. Sec. 28-695.01, also see A.R.S. Sec. 28-695(C)). (HB 2132).

Issuance of Driver's License

MVD will not issue a license to a person who notifies the department on his application that he is an alcoholic (as defined in A.R.S. Sec. 36-2021) or a drug-dependent person (as defined in A.R.S. Sec. 36-2501) unless the person successfully completes a medical screening process (A.R.S. Sec. 28-433) or submits a medical examination that includes a current evaluation from a certified substance abuse counselor indicating that in the opinion of the counselor, the condition does not affect or impair the person's ability to safely operate a motor vehicle. (A.R.S. Sec. 28-413(A)(5)). (SB 1087, HB 2132).

Reapplication Following Revocation

If a person's driving privileges are revoked as a result of an alcohol or drug-related offense, that person must provide MVD with a current evaluation from a certified substance abuse counselor indicating that in the opinion of the counselor, the condition does not affect or impair the person's ability to safely operate a motor vehicle. (A.R.S. Sec. 28-448(B)). (SB 1087, HB 2132).

Revoked and Suspended Driving Privileges

A new statute provides that certain license offenses (e.g. driving on a suspended or revoked license) can be charged if they are committed anywhere in the state. However, if you look at the individual statutes (e.g. A.R.S. Sec. 28-473), you will see that they still contain language limiting the scope of these offenses to public highways. (A.R.S. Sec. 28-476). (HB 2132).

Driving Permits

A person sentenced to the "treatment" alternative (renumbered to A.R.S. Sec. 28-692.01(D)) may now qualify, if otherwise eligible, for a driving permit for the last 60 days of their 90-day administrative per se suspension. (A.R.S. Sec. 28-694(B)). (HB 2132).

Nonresident Violator Compact

Authorizes ADOT to join the Nonresident Violator Compact, an interstate agreement allowing the state-to-state exchange of traffic violation records. Arizona may suspend or revoke a resident motorist's driving privileges based upon his failure to resolve a traffic citation issued outside the state. (A.R.S. Sec. 28-443 and A.R.S. Sec. 28-1606). (HB 2050).

MVD Jurisdiction

MVD may now accept convictions that are reported by a court of the United States government or an Indian tribe. The issue remains as to whether courts will accept these convictions as valid priors. (A.R.S. Sec. 28-443). (SB 1087, HB 2132).

Vehicle Registration

MVD may refuse to renew the registration of a vehicle if they are notified by a court that the registered owner is more than $200 delinquent in the payment of fines for civil or criminal traffic violations. The same would hold true if MVD was notified of the registered owner's failure to appear in a criminal traffic case. (A.R.S. Sec. 28-331, effective December 31, 1992). (HB 2351). (cont. on pg. 7)

Incarceration Costs

The court may order a person who is sentenced to a term of incarceration for either DUI or reckless driving to pay for the cost of their incarceration. The amount assessed would be based upon the actual incarceration costs incurred as well as the defendant's ability to pay part or all of those costs. (A.R.S. Sec. 13-814). (HB 2132).

Work Release

The court must now confirm that a defendant is employed or is a student before allowing work release from a DUI sentence. (A.R.S. Sec. 28-692.01(H)). (HB 2132).

Financial Assessments

The amount of restitution, assessments, incarceration costs and surcharges is not limited by the maximum fine that can be imposed under Secs. 13-801 (felonies) or 13-802 (misdemeanors). (A.R.S. Sec. 13-808(C)). (HB 2132).

Alcohol Screening

A county probation department may now conduct alcohol screening. (A.R.S. Sec. 28-692.01(A)). While alcohol screening is still mandatory following a conviction for DUI, it is discretionary with the court whether to order education or treatment. (A.R.S. Sec. 28-692.01(A)). (HB 2132).

Release Credits

On June 26, 1992, SB 1003 was signed into law as an emergency measure amending the statutes as they pertained to the earning of release credits. This act, which is effective retroactively to September 27, 1990, provides that a person within the Department of Corrections may begin to earn release credits after he/she has served one-quarter of the mandatory minimum sentence portion of his/her term. For the felony DUI offenders sentenced to a term greater than six months, this amendment allows them to begin to earn release credits after they have served approximately six weeks of the mandatory minimum six-month sentence. Prior to this amendment, they could not earn release credits during the first six months of their sentence. This new law will not affect the felony DUI offender sentenced to the mandatory minimum of six months in prison as a condition of probation. (A.R.S. Sec. 41-1604.06(C)). (SB 1003).

Proceeds from Forfeited Vehicles

This new statute establishes an anti-DUI fund supported by proceeds of vehicles forfeited pursuant to felony DUI convictions. Half of the money would go to the enforcement of DUI laws and the prosecution of DUI offenders, and the other half would go towards DUI educational and treatment programs. (A.R.S. Sec. 28-697.02). (HB 2132).

Alcohol Concentration of Deceased Driver

If an officer investigating an accident involving the death of a driver has probable cause to believe that the deceased driver committed an alcohol-related offense, the County Medical Examiner shall test the deceased driver to determine blood alcohol concentration. (A.R.S. Sec. 28-668(A)). (HB 2132).

Reclassification of Hit and Run Offenses

The felony offense of failure to stop has been reclassified dependent upon the nature of the injuries present. It is now a Class 5 felony if the accident results in death or serious physical injury. It is still a Class 6 felony if there are injuries other than death or serious physical injuries. (A.R.S. Sec. 28-661(B)). (HB 2132).

This outline has covered most of the major changes made in DUI and DUI-related laws. For a copy of the bills I've outlined, please contact me or call the Secretary of State's Office at (602) 542-4086. ^

Practice Tips:

Expert Testimony & Frye v. United States

Does all expert testimony need to comply with *Frye v. United States*? At least one Arizona case seems to suggest just that. Rule 702, Arizona Rules of Evidence, reads as follows:

Testimony by Experts:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *State Ex Rel. Collins v. Seidel*, 142 Ariz. 587, 691 P.2d 678 (1984), our supreme court wrote that "[c]ases construing Rule 702 have held that the proponent of evidence based on scientific, technical or specialized knowledge must make a showing of general acceptance under the rule of *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923). *State Ex Rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982). Also, required is a foundational showing by a qualified expert that the accepted technique was properly used and the results accurately measured and recorded.

For example, as several practitioners from our office have argued recently, Arizona law requires that such expert testimony on subjects like Child Sexual Abuse Accommodation Syndrome (CSAAS) must, as a prerequisite, meet *Frye*. The same arguments may be applicable to other areas. For example, what basis is there for predicting "propensity"? Is it based on a theory that can meet the *Frye* test? Several other types of evidence or expert testimony used by the state may be insufficiently scrutinized. Practitioners should stay alert for "expert testimony", especially where there is considerable controversy on it amongst experts.

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Making a Record: Settling Jury Instructions

Probably the most frustrating situation for an advocate is to have a winning argument on appeal without a basis for it in the record. The lack of an adequate record often hampers public defender appellate attorneys in every phase of the case from the change of plea to sentencing.

One of the more frustrating areas remains jury instructions. Trial judges, prosecutors and defense attorneys often have extensive arguments and discussions about jury instructions "off-the-record". The court reporter then makes a record of "terse" and often incomplete "settling" of instructions devoid of the full rational for the instructions by the trial judge and counsel.

As authority for putting as much as possible on the record, trial attorneys should keep a copy of *Gosewisch v. American Honda Motor Co.*, 153 Ariz. 400, 737 P.2d 376 (1987), in their trial notebooks for settling jury instructions. In a supplemental opinion, applicable to civil and criminal trials, then Chief Justice Gordon clarified what the court means about making a record. Justice Gordon wrote that:

The terminology "settling" jury instructions refers to the formal statement of the court's position and the parties' objections, rather than the preliminary, informal discussions aimed at reaching agreed-upon instructions.

We recognize that it is a common practice in both civil and criminal litigation for counsel and the court at various stages of the case to informally discuss proposed jury instructions. These informal discussions may continue for an extended period of time and often result in a core of instructions upon which the parties have reached agreement. We agree that reporting such informal sessions will usually just prolong the record and be of no benefit to the litigants or appellate courts.

However, when the "negotiations" and "preliminary indications" have ceased and the trial judge makes known which of the tendered instructions will and will not be given, informality must be abandoned. At this point, before the case is argued and before the jury is instructed, a full record on instructions should be made. The trial judge should make clear his rulings and the instructions he intends to give and the parties should state their objections to the judge's position on the instructions.

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BOOK REVIEW:
101 Ways to Avoid A Drunk Driving Conviction

By Gary Kula

The best way to control the problem of drunk driving is through education. The question is how to educate the public about the dangers of drinking and driving. In the schools, students are educated through programs sponsored by MADD and SADD before they even reach drinking age. Hopefully, these programs will have an impact on young people so that in years to come, drunk driving won't be the problem that it is today. Unfortunately, however, for most adults who did not have the benefit of these programs when they were growing up, an arrest for DUI is oftentimes their introduction to learning about drinking and driving.

When arrested and convicted for DUI, most offenders are required to attend an 8- to 16-hour treatment program as part of their sentence. Authors William C. Head and Reese I. Joye, Jr., decided that an arrest is too late for a person to become educated about alcohol. They wrote a book, *101 Ways to Avoid A Drunk Driving Conviction*, so that the general public could receive information about the effects of alcohol and be educated about the problem of drinking and driving before they are placed in a situation of being arrested. In order to get this information out to the public and for this book to be successful, it had to find its way into the right hands. With the selection of this controversial title, the authors hope to reach those who are in most need of information about alcohol. While the title has generated considerable controversy, it may result in greater exposure and wider dissemination of information, and perhaps in the long run, there will be fewer drunk drivers, fewer deaths on the highway, and a greater appreciation by the general public of how alcohol affects a person and impairs his/her driving ability.

The authors of this book are criminal defense lawyers who have represented numerous defendants charged with drunk driving. Like every other person, they are against drunk driving. It is made clear throughout the book that individuals who have had too much to drink should not drive. For those individuals who decide to drive after drinking, they are told that they are risking not only injury to themselves and others, but that they also are facing serious consequences including a criminal conviction and skyrocketing insurance rates. While the authors take the position that the best decision a person can make is not to drive after drinking, they wrote this book with the recognition that no matter what is said to certain individuals, there will always be those who will attempt to drive after drinking. For these individuals who place themselves in the ill-advised position of being behind the steering wheel after drinking, common sense advice is given to help these people return home safely without endangering others and without being arrested for driving while under the influence of alcohol.

Much criticism has been directed towards this book because of the suggestions it makes as to how a person can avoid being detected as a drunk driver. Critics have also expressed displeasure over the authors' encouragement that drivers fully understand and assert their rights if stopped by an officer for drunk driving. In Boston, for example, 300 television commercial spots had been planned to promote this book. There was so much opposition from MADD and SADD, that the commercials subsequently were canceled. The authors also have reported difficulty in having the book placed in stores due to the opposition of groups such as MADD.

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In particular, these groups have directed much of their criticism towards the authors' suggestion that a person carry a "kit" in his/her car in the event he/she is pulled over for drunk driving. It is suggested that such a kit contain registration documents, eye drops, a tape recorder, foods to cover the odor of alcohol, change for phone calls, money for bond, and an attorney's card. While protesting groups suggest that such a kit allows a person to get away with drunk driving, this kit is actually quite practical in its content. All of us know that if a police officer comes upon a driver who has an odor of alcohol about him/her and who has difficulty producing documents and identification, the officer will undertake a complete DUI investigation including field sobriety tests. Too many people are wrongly being processed and prosecuted as a result of an officer forming a DUI mind-set based upon this initial contact and his preliminary observations. Since the issue we are dealing with here is whether alcohol has impaired a person's ability to control his/her car, it is sound advice that a person mask the odor of alcohol and have all his/her documentation ready at hand to avoid being placed in a position of having to prove that he/she is not impaired through field sobriety tests and possibly court proceedings. Once an innocent person is arrested for DUI, he/she faces a difficult uphill battle in a court of law. In recognition of this, the authors dedicated their book to the attorneys, judges and citizens who face tremendous governmental and societal pressure in their quest for the fair treatment of, and justice in the courts for, those charged with DUI.

This book is also one which belongs on the shelf of every attorney. As attorneys, we are held to a higher standard of conduct and we cannot afford to jeopardize the safety of others, our career and our profession by driving while under the influence of alcohol. This book offers sound advice about the effects of alcohol and how any person can take precautions to ensure that he/she is not in the position of sitting behind a steering wheel after having consumed too much alcohol. The book also explains the absorption and elimination of alcohol in layman's terms and provides practical information as to how food intake and a modification in drinking behavior can significantly diminish the chances of being an impaired driver.

The book is also of value to attorneys as it provides data and information which may be helpful in the defense of DUI cases. For example, the book outlines the DUI laws in each of the fifty states and lists the alcohol content of the most common alcoholic beverages by brand name. You may find that using the exact alcohol percentage of your client's beverage can turn the retrograding calculations in your client's favor. The book also contains business cards with sample advisements on the back as to constitutional and statutory rights in the event a person is stopped for drunk driving. There is also a 28-page DUI Client Intake Interview Form which thoroughly explores all potential areas for DUI defense.

While this one book is not going to solve the problem of drunk driving, it may help. Its controversial title will catch the attention of those who are most likely to drive after drinking and who are most in need of information about the effects of alcohol and the dangers of drunk driving. To discourage first-time DUI offenders from becoming repeat offenders, a few attorneys have started the practice of giving this book away to each of their clients as part of their retainer fee. The authors priced the book at $19.95 so that it could land in as many hands as possible. This book should be read by anyone who ever has, or potentially will ever, drive after drinking.

The book is available through Maximar Publishing Company at 1-800-344-3346.

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State v. Bartlett
112 Ariz. Adv. Rep. 3 (SC, 5/8/92)

Defendant was convicted of two counts of sexual conduct with a minor and received a 40-year sentence. The Arizona Supreme Court held it was cruel and unusual punishment under the Eighth Amendment of the United States Constitution because the facts showed the girls were almost 15 and had willingly consented to the sexual acts. Defendant was resentenced and received five-and-one-quarter years on the first count and seven years on the second, to be served concurrently. The United States Supreme Court vacated the opinion in light of *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991). On remand, the Arizona Supreme Court found under *Harmelin* that the 40-year sentence (1) was grossly out of proportion to the severity of the crimes since the sex was voluntary and nonviolent, (2) it was disproportionate to others imposed in Arizona for more serious crimes, and (3) it was disproportionate to sentences imposed on similarly situated defendants in other jurisdictions. The five-and-one-quarter and seven-year concurrent sentences were affirmed.

State v. Downing
112 Ariz. Adv. Rep. 21 (CA 1, 5/5/92)

Defendant appealed from convictions of possession of dangerous drugs for sale and possession of dangerous drugs. Defendant argued he did not participate in the crime or, if he did, he was entrapped into participating. The court held defendant was not entitled to an entrapment instruction where it was inconsistent with the defense and that the motion for a directed verdict was properly denied. However, a mistrial should have been granted because the prosecutor's referral to defendant's post-arrest silence was deliberate, not inadvertent and not a single occurrence. The convictions were reversed and remanded for a new trial.

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State v. Allgood
112 Ariz. Adv. Rep. 24 (CA 1, 5/5/92)

Defendant was convicted of sexual conduct with a minor and sexual abuse involving a former stepdaughter. On appeal, defendant argued that a taped phone call of the victim's confrontation of him was illegal. The call was made at the request of and taped by a police detective. Taping a phone call is not prohibited if done with the consent of a party. A.R.S. Sec. 13-3012. Intercepting the call did not violate either the United States or Arizona Constitution's prohibitions on illegal searches and seizures.

The trial court limited defendant's cross-examination as to why the victim did not report defendant's conduct when she reported molestation by her stepbrother. The trial judge did not abuse his discretion in finding the victim's explanation for the delay was sufficient and the probative value of the evidence minimal. The prejudicial impact of the evidence outweighed its probative value.

The jury conducted their own investigation into some of the questions at trial. The fact that extraneous information reached the jury by means of their own investigation was not harmful juror misconduct and the new trial was properly denied.

State v. Bonnell
112 Ariz. Adv. Rep. 41 (CA 1, 5/7/92)

Defendant was convicted of armed burglary, theft and misconduct with a weapon while on parole. Subsequent case law held that a defendant who stole a weapon during the course of a burglary did not by that theft alone commit armed burglary. Defendant filed a Rule 32 Petition based on a significant change of law. The state argued that the claim was precluded and the trial judge agreed. The court discussed the relationship between preclusion under Rule 32.2 and waiver under Rule 32.10. The case was remanded to determine whether the record reflected a willingness or present ability to use the stolen weapon as part of the offense.

State v. Aquilar
112 Ariz. Adv. Rep. 48 (CA 1, 5/12/92)

The trial court entered a judgment of guilt when placing defendant on probation pursuant to the Domestic Violence Diversion Program. On appeal, defendant argues this is improper as the statute provides that no judgment of guilt is made. The court agreed, reversed the conviction and remanded the case. [Represented on appeal by James R. Rummage, MCPD.]

Cienfuegos v. Superior Court
112 Ariz. Adv. Rep. 52 (CA 1, 5/12/92)

Defendants were committed to the Department of Corrections and placed on house arrest, subject to all rules and regulations of ADOC. Defendants allegedly violated the conditions of the house arrest program and were indicted on a charge of escape. The trial court denied defendants' motions to dismiss and defendants appealed. The appellate court held that a person on house arrest is subject to all the limitations of rights and movements that other inmates are subjected to and that they are in a correctional facility. The court was not persuaded by defendants' argument that home arrestees are in essence parolees, because, the court noted, the restrictions under home arrest are greater than when on parole. A home where the home arrestee is placed constitutes a correctional facility. [Represented on special action petition by Albert H. Duncan, Lisa A. Gilels and Carol D. Berry, MCPD.]

State v. Miller
112 Ariz. Adv. Rep. 58 (CA 1, 5/14/92)

Defendant was convicted of unlawful flight from a law enforcement vehicle and endangerment. Defendant argues the unlawful flight statute is unconstitutionally vague and violates due process. The statute's description of the necessary lights for an authorized emergency vehicle does not render the statute vague.

The defendant requested a jury instruction that the statute requires a visible light. The state did not need to establish the visibility of the overhead lights because it is not an essential element of the offense.

Defendant requested a mistrial when an alternate juror left a deliberating juror a note expressing belief in the defendant's guilt. A mistrial was properly denied where the improper juror communication did not prejudice the defendant.

The defendant was fined $150,000. The $150,000 fine imposed in this case was not cruel or unusual punishment.

State v. Robles
112 Ariz. Adv. Rep. 68 (CA 2, 5/7/92)

Police received a call regarding erratic driving, but did not get a plate number or a description of the driver. The police saw a vehicle matching the broadcast description. By the time they caught up to it, defendant had parked and turned off the ignition. Defendant failed the field sobriety test. The trial court dismissed for lack of probable cause and for no actual physical control. The appellate court held that probable cause was not necessary for an investigative stop; the state only needed to show specific and articulable facts for an objective basis to suspect defendant of criminal activity. Even this was not required if defendant was not "seized". There were no facts to show defendant was a subject of an investigatory stop at the initial contact with the police, and no seizure occurred until the police had reasonable grounds to detain defendant for a field sobriety test which provided probable cause for arrest. Further, if the initial encounter was a seizure, it was supported by sufficient grounds. Finally, no grounds existed to dismiss on the issue of actual physical control under *State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983), because the officer saw defendant driving before defendant stopped the vehicle and turned off the ignition.

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State v. Latimer
112 Ariz. Adv. Rep. 70 (CA 2, 5/7/92)

Defendant and two others were charged with assault and related charges. His codefendant entered an agreement to testify at defendant's trial. At the defendant's trial, the codefendant invoked his Fifth Amendment right and refused to testify. The state withdrew from the agreement. The state was then allowed to use the codefendant's testimony from his trial against the defendant. The defendant was convicted. The court reversed and remanded for a new trial based on the admission of the codefendant's prior testimony. The trial court admitted the codefendant's testimony under the declaration against penal interest and the catchall hearsay exceptions, finding him to be unavailable at defendant's trial. This violated the defendant's right to confrontation. The appellate court held this testimony was inherently unreliable and the error was not harmless.

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State v. Berger
113 Ariz. Adv. Rep. 50 (CA 2, 4/15/92)

After a Rule 11 hearing, the defendant was found incompetent to stand trial, with a substantial probability that his competency could be restored. He was sent to the Mental Health Unit for a period not to exceed 150 days. Upon release, the defendant went to trial and was found guilty.

The trial court erred when it failed to hold a new competency hearing subsequent to the defendant's return from the Mental Health Unit. Rule 11.6(a)(1) requires that such a hearing shall be held. The proper remedy is to remand for a determination of whether a retroactive finding can be made that the defendant's competency was restored. If the court then finds that the defendant was incompetent or is unable to make a determination, the convictions will be reversed and the defendant entitled to a new trial.

The defendant's attorney moved for a Rule 11 hearing the day before trial. An assertion by counsel that a defendant is displaying peculiar behavior is not sufficient by itself to raise a question of the defendant's competency. Immediately before the start of the trial, the judge questioned the defendant and found that he was oriented as to time, place and person, and appeared capable of assisting with his defense. It was not an abuse of discretion to deny a Rule 11 request on this basis.

The defendant waived his right to a jury trial on the state's allegation of a prior conviction. It is appropriate to remand for a determination of competency to waive the right to a jury trial because of the defendant's twenty-year history of schizophrenia and hospitalizations, the court's failure to redetermine his competency to stand trial, the fact that the defendant did not testify at trial, and his sometimes nonresponsive answers to the court's questions. If the defendant is found to have been competent, voluntariness of the waiver also must be determined, because the trial court found voluntariness without questioning the defendant.

State v. Superior Court
113 Ariz. Adv. Rep. 11 (CA 1, 5/18/92)

The defendant was charged with aggravated assault. The state alleged that she used a knife to cause physical injury to her husband. The defendant stated that the victim received psychiatric treatment for multiple personality disorder. The defendant claimed that, at the time of the assault, the victim was manifesting one of his violent personalities and the defendant acted in self-defense. The trial court granted the defendant's motion to require disclosure of all of the victim's medical records. The state sought relief by special action.

The Victims' Bill of Rights allows a victim to refuse to produce his medical records. The Victims' Bill of Rights provides that a victim can "refuse an interview, deposition, or other discovery request . . ." Medical records come within the plain meaning of "other discovery request". When a defendant's constitutional right to due process conflicts with the Victims' Bill of Rights, due process is the superior right. This is so because due process, which includes the right to present a defense, is the foundation of our legal system.

If the defendant's need to effectively cross-examine and impeach the victim in order to establish a justification defense requires access to the medical records before trial, then the Victims' Bill of Rights must yield to the federal and state constitutions' mandates of due process. If the medical records have not been made available to the prosecution or other state agent, then the victim has the right to refuse the defendant's discovery request under the Victims' Bill of Rights. However, if the trial court determines that *Brady* and due process require disclosure of exculpatory evidence, and if the court determines that the medical records are exculpatory and essential to the presentation of the defendant's theory of the case or necessary for impeachment of the victim relevant to that theory, then the defendant's due process right to a fair trial overcomes the physician/patient privilege.

Any restrictions on the defendant's access to essential information imposed pursuant to the Victims' Bill of Rights must be balanced between the interest of protecting the victim versus the defendant's due process right to a fundamentally fair trial. In camera inspection of the medical records will allow the trial court to assess the necessity of the medical records for cross-examination purposes. [Represented on special action by Curtis F. Beckman, MCPD.]

In the Matter of the Appeal
in Maricopa County Juvenile Action No. JV-123196
113 Ariz. Adv. Rep. 42 (CA 1, 5/28/92)

The juvenile defendant was adjudicated delinquent for committing an aggravated assault.

The juvenile, while riding a bicycle, sprayed another cyclist, the victim, with an unknown substance contained in a canister. A small amount of spray entered the victim's eye, causing burning and tearing. The victim rode a little further and stopped. The juvenile sprayed the victim again, on the other side of the face. The victim got scared and rode home, even though his vision was blurred.

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The victim described the juvenile in detail to his mother. A half-hour later, the victim and his mother found the juvenile, riding a bicycle and carrying a canister. The juvenile denied everything and rode away. The victim and his mother saw the juvenile a few more times. Ten days after the incident, the victim identified the juvenile from a photo lineup. Proof of the juvenile's identity was sufficient. Even though the victim was very upset and had blurred vision after the second time he was sprayed, the victim got a good look at the juvenile between the first and second times he was sprayed.

However, these facts do not constitute an assault of a person whose capacity to resist is substantially impaired. A.R.S. Sec. 13-1204(A)(8). This was not an aggravated assault because the impairment did not exist before the assault began. Instead, the impairment resulted from the assault. Every assault that does not cease the instant one party achieves the upper hand does not constitute an aggravated assault. The condition causing substantial impairment should be one that would normally preexist an assault, and not one that occurs as a result of the assault. The juvenile committed an assault, rather than an aggravated assault. [Represented on appeal by John W. Melvin, MCPD.]

State v. Cole
113 Ariz. Adv. Rep. 46 (CA 1, 5/25/92)

The defendant was a passenger in a car stopped because of an expired registration. The officers discovered that the defendant had an outstanding warrant for violation of probation and advised him that he was under arrest. The defendant denied the warrant and got out of the car. Two officers physically restrained the defendant by clutching his arms and his shirt. The defendant escaped from actual restraint by waving his arms, dragging the officers approximately 25 feet, and fleeing.

Where the defendant was under arrest and was being held by the officers, he was in custody and was subject to prosecution for escape. A reasonable person in the defendant's position would have thought that he was being arrested. His freedom of movement was curtailed by force. [Represented on appeal by Helene F. Abrams, MCPD.]

State v. Emerson
113 Ariz. Adv. Rep. 30 (CA 1, 5/21/92)

The defendant was the wheel-man in an armed robbery. His codefendant entered the convenience store, approached the clerk and demanded money. When the clerk indicated that she thought he was joking, he said that he would blow her head off if she didn't give him money and he displayed what appeared to be a .45 caliber pistol. The defendant pled guilty to accomplice to armed robbery. His sentence was enhanced for "dangerousness".

A loaded pellet gun constitutes a dangerous instrument for purpose of enhancement of the defendant's sentence. A loaded and operable pellet gun is a dangerous instrument because it can inflict sufficiently serious bodily injury. The facts show that the pellet gun was loaded and operable because of the words and conduct of the person using the gun. The codefendant's statement to the clerk was part of the factual basis for the plea and therefore was a suitable factor in determining whether the weapon was operable and loaded. No one produced any evidence to refute it.

State v. Evans
113 Ariz. Adv. Rep. 16 (CA 1, 5/19/92)

A justice of the peace issued an arrest warrant after the defendant's failure to appear. After the defendant appeared, a judge quashed the warrant. There was no record that the justice court notified the Sheriff's Office that the warrant was quashed.

The defendant later was stopped for a traffic violation. The officer checked the records, found that a warrant existed, and arrested the defendant. The officer had trouble handcuffing the defendant and thus asked the defendant to relax one hand. The defendant dropped a marijuana cigarette. The officer searched the car and found more marijuana and paraphernalia.

The trial judge erred in granting the defendant's motion to suppress. The purpose of the exclusionary rule is to deter unlawful police conduct. Neither the arresting officers nor the police department were negligent in arresting the defendant or in searching his person. In *State v. Green*, 162 Ariz. 383, 783 P.2d 829 (App. 1989), the negligence of the police department rather than the justice court caused the arresting officer to believe that the warrant still was valid. The instant case is distinguishable because there was no evidence that the arresting officer or the police department were negligent. The good-faith exception statute applies. [Represented on appeal by James H. Kemper, MCPD.]

State v. Hanna
113 Ariz. Adv. Rep. 32 (CA 1, 5/21/92)

The police stopped the defendant for an expired vehicle registration. A computer check showed that defendant's driver's license was suspended. The defendant was arrested and placed in the patrol car. A warrantless search of the locked glove box of his car yielded drugs and drug paraphernalia.

The defendant's motion to suppress was denied. The warrantless search of a locked glove box was a proper search incident to a lawful arrest. The purpose of allowing a warrantless search of a vehicle incident to the arrest of an occupant is to ensure the safety of the officer and to protect evidence from being intentionally destroyed. The exception has been interpreted by several federal courts to uphold warrantless searches incident to arrest where the possibility of an arrestee's grabbing a weapon or evidence was equally as remote as the defendant's chances here.

There was a valid search incident to arrest, so the court did not decide if it also was a valid inventory search. Furthermore, any extension of the Arizona Constitution is a matter left for the Arizona Supreme Court. [Represented on appeal by Carol A. Carrigan, MCPD.]

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State v. Krantz
113 Ariz. Adv. Rep. 61 (CA 2, 5/28/92)

The defendant rear-ended a motorcycle stopped at a red light and was convicted of manslaughter.

It was not error to deny the defendant's request for redetermination of probable cause. The state did not inform the grand jurors of the lesser-included offense of negligent homicide. However, once a trial jury has made a determination of guilt beyond a reasonable doubt, probable cause is reviewable no longer. Appellate review of the denial of a motion for redetermination of probable cause must be sought by special action.

It was not error to preclude the defendant from presenting evidence of methamphetamine in the victim's system. The evidence showed that the defendant had a BAC of between .28 and .30, refused his passenger's demand that he let her drive, and drove approximately 10 mph over the speed limit. There was no showing that the victim was impaired or that such an impairment would have assisted the defense.

After the collision, the defendant was taken to the hospital. An officer there observed signs of intoxication and smelled alcohol. The defendant received his Miranda warnings, and when asked if he understood them, replied, "Okay, I guess so." The officer then told the defendant that he was going to have blood drawn and asked him to submit to a breath test. The defendant then stated, "Hey, if this is going to affect me in any way, I want a lawyer." The officer said that he then stopped questioning the defendant. However, the defendant's blood was drawn after he signed a consent form from the hospital, and he submitted to a breathalyzer test.

The defendant's motion to suppress his BAC test result was denied. The defendant did not consent to the BAC test and claimed that his rights under the DUI implied consent law were violated. However, outside the DUI context, *Schmerber v. California* and its progeny apply to obtaining evidence from an accused. Those arrested for non-DUI offenses may be compelled to provide such evidence. Such an individual has a right against unreasonable searches and seizures, but in the present case, the intrusion was justified under the circumstances and was made in a proper manner. The disparate treatment of DUI suspects and those arrested for other crimes is reasonably based. The Arizona Constitution does not provide more protection.

State v. Reynolds
113 Ariz. Adv. Rep. 39 (CA 1, 5/28/92)

The defendant pled guilty to attempted possession of a vehicle that was later recovered and resold by the victim's insurer. Defendant was ordered to pay the insurance company's loss on the sale.

It was not error to order restitution to the insurer for the difference between the amount paid to the victim and the amount recovered from resale. Although the resale was at a closed dealer's auction, there was no evidence that the resale was not conducted in the insurance company's ordinary and customary business practices. The amount of restitution does not have to be based on the difference between fair market value at the time of theft and fair market value at the time of recovery as in a civil action for damages. The insurer's method of resale was not an attempt to obtain the fair market value of the vehicle. However, the agent used its customary resale method, which would have been the same whether or not there was any criminal case and any possibility of restitution. An insurance company may have legitimate reasons for having an agreement with an agent that sells recovered property at closed auctions. Furthermore, restitution does not require proof beyond a reasonable doubt and is controlled by different rules than the adjudication of guilt.

State v. Smith
113 Ariz. Adv. Rep. 26 (CA 1, 5/21/92)

The defendant pled guilty to the second degree murder of her husband. At the change of plea hearing, the trial court did not advise the defendant that she would be required to pay restitution or mention the amount of restitution. The presentence report indicated that the defendant would owe restitution of $1,470.70 to her husband's parents for funeral expenses, and $5,349.91 to an insurer for damage to the room in which the murder occurred. The defendant filed a notice of appeal from the sentence only, and defense counsel filed an *Anders* brief raising no issues.

The court has subject matter jurisdiction to consider the voluntariness of the plea even though the defendant appealed from the sentence only. The notice of appeal serves as a notice pleading rather than a jurisdictional limitation on the grounds the court may consider on appeal. Technical errors in a notice of appeal are nonjurisdictional defects that will not render it ineffective absent a showing of prejudice to the appellee.

The state's challenge to the court's consideration of the validity of the defendant's conviction relates more to scope of review than to jurisdiction. In a criminal defendant's appeal from either a conviction or sentence, the court is statutorily authorized to search the record for fundamental error. The only exception lies where searching the entire record for error would be detrimental to a defendant. In the present case, the court does not address the voluntariness of the defendant's plea because she has conceded that she may well be prejudiced by her own appeal.

The defendant's sentence to an aggravated term was not fundamental error because it is within the statutory range and meets the terms of the plea agreement. Restitution was also appropriate under the facts of this case. [Represented on appeal by Edward F. McGee, MCPD.]

State v. West
113 Ariz. Adv. Rep. 20 (CA 1, 5/21/92)

The defendant waived his right to a jury and was found guilty of several counts of fraudulent schemes and artifices and theft involving numerous victims.

The trial court did not commit reversible error by failing to make findings of fact and conclusions of law, thus denying the defendant notice of the basis of the court's verdict. The law does not require such findings, but the Arizona Supreme Court has encouraged trial courts to state on the record their reasons for their decisions in criminal cases to lessen the appellate burden.

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The trial court did not err in finding an intent to defraud because there was evidence that the defendant lied to the victims, spent money on personal expenditures and gambling activities while refusing C.O.D. deliveries due to lack of business funds, and made misrepresentations to the Registrar of Contractors regarding complaints from victims.

The restitution order does not constitute an illegal sentence. The restitution order does not create a debt between the defendant and the victims, but is part of the criminal judgment imposed by state law. It is not affected by the defendant's prior Chapter 7 bankruptcy. This is so even where the defendant was civilly ordered to repay the victims and then had those debts discharged in federal bankruptcy proceedings.

The portion of the order setting the amount of restitution is vacated because the record contains discrepancies regarding the amounts owed to various victims. The case is remanded for determination of the amount of restitution. The defendant should be present at the restitution hearing and be allowed to contest any disputed amount. The court strongly suggests that the trial court's determinations be supported by factual references to the existing record to avoid any confusion in any future potential appeal of the amount of restitution. [Represented on appeal by Paul C. Klapper, MCPD.]

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State v. Tsosie
114 Ariz. Adv. Rep. 3 (CA 1, 6/2/92)

Defendant was originally charged with resisting arrest. He was acquitted at trial. A second charge of resisting arrest was dismissed without prejudice for violating Rule 8. The grand jury later reindicted him for resisting arrest and aggravated assault arising out of the second incident. The trial court dismissed the indictment for prosecutorial vindictiveness and the state appealed. The court held that if the defendant has shown that all of the circumstances, when taken together, support a realistic likelihood of vindictiveness, there will be a presumption of vindictiveness. The burden then shifts to the prosecutor to show the decision to prosecute was justified. The remedy for a prosecutorial vindictiveness is dismissal of all charges, not just the additional charge, in order to deter vindictiveness. The trial court's dismissal is affirmed.

"S.A." v. Superior Court
114 Ariz. Adv. Rep. 6 (CA 1, 6/2/92)

"S.A.", a victim, was subpoenaed by the state as a witness to testify against the accused. Believing she could not be compelled to testify under the Victims' Bill of Rights, she did not appear at trial. A warrant was issued and she was arrested. The trial court ruled that she could not refuse to testify based on the Victims' Bill of Rights. The appellate court granted special action relief, holding that the Victims' Bill of Rights allowed for the refusal of certain discovery requested by the defense, but not the right to refuse a court order to testify at trial. Otherwise, a defendant's right to confrontation would be violated.

State v. Conlin
114 Ariz. Adv. Rep. 24 (CA 1, 6/4/92)

The trial court ordered defendant to pay a fine and surcharges. He ordered the money paid to the state's general fund instead of the Drug Enforcement Account as mandated by the statute because the judge's division receives money from the Drug Enforcement Account. The state appealed and the appellate court reversed, indicating the judge does not have a direct, personal, substantial pecuniary interest in any convictions. The defendant's due process right to a fair and impartial trial was not violated. [Represented on appeal by Lawrence S. Matthew, MCPD.]

State v. Baca
114 Ariz. Adv. Rep. 27 (CA 1, 6/4/92)

While in custody on other matters, defendant was indicted for trafficking in stolen property. He filed a motion to dismiss or for a speedy trial under Rule 8.3(b) and mailed a copy to the state. Four months later, defendant filed a writ of habeas corpus and attached the motion as an exhibit. The state opposed it claiming it never received the earlier motion. The trial court denied the motion and the case was reassigned. The new judge reconsidered and granted the motion dismissing the case with prejudice. The appellate court found no abuse of discretion. There were proper grounds under Rule 16.1(d) for the second judge to reconsider the first judge's ruling. The defendant properly complied with Rule 8.3(b). The presumption of receipt of proper mailing was not overcome, and certified or registered mail was not required. Failure to try him within the allotted time required dismissal. [Represented on appeal by Lawrence S. Matthew, MCPD.]

State v. Rushton
114 Ariz. Adv. Rep. 29 (CA 1, 6/9/92)

Defendant was convicted of indecent exposure, but the jury could not reach a verdict on three counts of child molestation. Defendant later entered an *Alford* plea to attempted child molestation and the remaining counts were dismissed. On appeal, defendant alleges for the first time that one count, the indecent exposure count, is duplicitous, arguing that several counts could have been alleged. The appellate court held defendant waived any error by failing to object prior to or at trial.

At trial, a social worker testified concerning statements by the victim. The social worker's statements regarding the victim's testimony were within the medical treatment exception to the hearsay rule.

The plea agreement, as written, illegally allowed the defendant to avoid the provisions of the "dangerous crimes against children" statute. This illegality did not require the court to set the agreement aside and the court declined to set it aside based on public policy reasons. An illegally lenient sentence is not fundamental error.

(cont. on pg. 15)

State v. Superior Court (Ryberg)
114 Ariz. Adv. Rep. 32 (CA 1, 6/9/92)

The appellate court holds it is not necessary to sever charges of driving while impaired (A.R.S. Sec. 28-692(A)(1)) from charges of driving with a BAC over .10 within two hours (Sec. 28-692(A)(2)). Defendant claimed that a combined trial would unfairly prejudice her if both charges were tried to the same jury. Defendant specifically claimed that admission of the BAC reading on the (A)(1) charge required relation-back evidence, but admission of this same reading on the (A)(2) charge did not require relation-back evidence. The court rejected this argument, stating that under *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989), relation-back testimony is only required when the proponent of the intoxilyzer results seeks the statutory presumption of intoxication at .10. Under new Sec. 28-692(A)(2), a valid BAC reading of .10 or more within two hours is admissible without relation-back evidence, and new A.R.S. Sec. 28-692(A)(1) only requires impairment to the slightest degree. The admission of defendant's specific BAC to establish a violation of Sec. 28-692(A)(2) will not unfairly prejudice the defendant on a violation of Sec. 28-692(A)(1), which now only requires impairment to the slightest degree. ^

July Jury Trials

June 29

Paul A. Lerner: Client charged with aggravated DUI. Trial before Judge Portley ended July 02. Client found guilty. Prosecutor N. Miller.

James M. Likos: Client charged with possession of narcotic drugs. Trial before Judge Campbell ended July 06. Client found guilty. Prosecutor B. Bayer.

July 01

Todd K. Coolidge: Client charged with possession of marijuana. State dropped prior. Bench trial to Judge Portley ended July 01. Client found guilty (judge designated offense a misdemeanor). Prosecutor J. Martinez.

Albert H. Duncan: Client charged with sexual assault and sexual abuse. Trial before Judge Hotham. Client found not guilty. Prosecutor B. Jorgensen.

Donna L. Elm: Client charged with possession of dangerous drugs and possession of drug paraphernalia. Trial before Judge Hall ended July 13. Client found guilty. Prosecutor A. Davidon.

Anna M. Unterberger: Client charged with 1st degree murder. Trial before Judge Sheldon ended July 07. Client found guilty. Prosecutor M. Morrison.

July 06

Marie D. Farney: Client charged with aggravated assault. Trial before Commissioner Ellis ended July 08. Client found guilty. Prosecutor B. Amato.

Nicholas S. Hentoff: Client charged with burglary. Trial before Judge Bolton ended July 10. Client found guilty. Prosecutor J. Garcia.

July 08

Andrew J. DeFusco: Client charged with two counts of aggravated DUI. Trial before Judge Sheldon ended July 10. Client found guilty. Prosecutor B. Baker.

July 13

Todd K. Coolidge: Client charged with 2nd degree burglary with two priors. Trial before Judge Sheldon ended July 14. Client found guilty. Prosecutor D. Udall.

Eric G. Crocker: Client charged with two counts of manslaughter and aggravated assault (dangerous). Trial before Judge Sheldon ended July 21. Client found guilty. Prosecutor B. Baker.

July 16

Cecil P. Ash: Client charged with possession of marijuana (designated misdemeanor). Trial before Judge Hendrix ended July 16. Client found guilty. Prosecutor R. Harris.

J. Scott Halverson: Client charged with offering to sell marijuana. Trial before Judge Grounds ended with a hung jury July 23. Prosecutor B. Winter.

July 20

Roland J. Steinle: Client charged with 1st degree murder (3 counts), burglary and theft. Trial before Judge Hendrix ended July 31. Client found guilty of burglary, theft and one count of 1st degree murder. On Counts 2 and 3, found guilty of 2nd degree murder. Prosecutor D. Schlittner.

July 21

Curtis Beckman: Client charged with possession of narcotic drugs. Bench trial to Judge Schneider ended July 28. Client found guilty. Prosecutor M. Wales.

Robert C. Billar: Client charged with child molestation. Trial before Judge Noyes ended July 28. Client found guilty. Prosecutor S. Novitsky.

July 22

Christine M. Funckes: Client charged with two counts of sale of narcotic drugs. Trial before Judge Hotham. Client found guilty. Prosecutor P. Crum.

(cont. on pg. 16)

July 23

Elizabeth S. Langford: Client charged with aggravated DUI with two priors. Trial before Judge Sheldon ended July 23. Client found guilty. Prosecutor B. Baker.

Wesley E. Peterson: Client charged with two counts of armed robbery (dangerous). Trial before Judge Grounds ended July 30. Client found guilty. Prosecutor J. Martinez.

July 27

Anna M. Unterberger: Client charged with possession of narcotic drugs. Trial before Judge Pro Tempore Barker ended July 29. Client found guilty. Prosecutor R. Harris.

July 28

Donna L. Elm: Client charged with robbery (4 priors). Trial before Judge Campbell ended July 31. Client found not guilty. Prosecutor D. Drexler.

Richard P. Krecker: Client charged with aggravated sexual assault. Trial before Judge D'Angelo ended July 30. Client found guilty. Prosecutor D. Reh.

Thomas M. Timmer: Client charged with leaving the scene of an accident. Trial before Judge Dann ended July 30. Client found not guilty. Prosecutor Z. Manjencich. ^

July Sentencing Advocacy

Peggy Simpson, Client Services Coordinator: Client admitted to probation violation, and intensive probation officer recommended prison. The client was given a psychological exam and the diagnosis was depression. The findings were discussed by client services coordinator and staff at the Probation Department's Community Punishment Program. The client was then screened and accepted into the program. The probation officer submitted a supplemental report recommending reinstatement to I.P.S. On August 13, 1992, the client was reinstated by Judge Campbell to I.P.S. with three months jail. Attorney: Darius M. Nickerson.

Peggy Simpson, Client Services Coordinator: Client pled to Conspiracy to Possess with Intent to Sell, Class 2, probation eligible. He had one prior felony, one term D.O.C. The presentence report recommended a presumptive term of D.O.C. with information submitted to support the recommendation. Mitigating factors were developed and a report/sentencing proposal was submitted to Judge Schneider. On July 29, 1992, the client was sentenced to 7 years Intensive Probation Supervision with no jail. Attorney: Randy F. Saria, Sr. ^

Training Calendar

September 12 & 13

AACJ presents "Creating Reasonable Doubt" on Saturday and Sunday at the Arizona Biltmore Hotel. This day-and-a-half seminar features nationally and locally known criminal defense attorneys including, Jim Kemper of our office, Michael Kimerer, Larry Debus, Tom Henze, Robert Hirsh, Larry Pozner and Juanita Brooks, as well as NACDL President Jeffrey Weiner. Forty attorneys from the office will be able to attend.

September 15

The MCPD Office's support-staff seminar "Legal Citations", originally scheduled for this date, has been cancelled. The session will be rescheduled after the first of the year.

September 25

The MCPD Office presents "Client Relations". This half-day seminar will discuss issues relating to the successful representation of clients, including client communication, explaining plea negotiations, dealing with family members, handling client complaints, and enlisting the client's help in resolving the case. Presenters will include Emmet Ronan and other well-known criminal defense lawyers. Faculty for the seminar will include Dean Trebesch, Emmet Ronan and Michael Tansy, a communications expert. There will also be a panel discussion with Robert Guzik, Chuck Krull, Karen Kemper and the Honorable Dennis Dairman.

October 09

The MCPD Office will present a state-wide sponsored seminar on the Fourth Amendment and motions to suppress. Speakers and specific topics to be announced. Readers wishing to offer suggestions for topics and speakers are urged to contact the Maricopa County Public Defender's Office Training Director.

October 21

The MCPD Office presents "Legal Issues for Support Staff" from 9:00 a.m. to 11:00 a.m. in the Training Facility. Attorneys Mara Siegel and Christopher Johns will present important legal issues for support staff, including confidentiality, their roles as agents for attorneys, understanding basic legal issues, the limits of information they can give over the telephone and other related issues. ^

Personnel Profiles

On August 17th, the following two attorneys joined our office with five other new attorneys (named in last month's newsletter):

Leslie Newhall received her B.A. in Spanish from Arizona State University where she also earned her law degree. Following her admission to the Arizona State Bar in October of 1991, Leslie has been working as a sole practitioner in general practice, including handling misdemeanor cases.

Robert Ventrella earned his B.A. in History in 1977 from Arizona State University were he later received his law degree in 1981. Robert, who was admitted to the Arizona State Bar in 1981 and the Colorado State Bar in 1992, comes to us from the Maricopa County Attorney's Office where his last assignment was the West-Side Office. He also worked for the County Attorney on the Grand Jury Bureau, in Juvenile Court and in Trial Group D. Prior to joining the County Attorney's Office, he worked as an Assistant City Prosecutor for the City of Phoenix. From 1984 to 1987, Robert served in the U.S. Navy, working in the Judge Advocacy General's Corps, Naval Legal Service Office. Prior to joining the Navy, Robert worked as bailiff for Judge Goodfarb.

On September 7th, after completing their training, our seven new attorneys will begin their trial duties. Leslie Newhall will go to Group A; Robert Ventrella will go to Group B; and, Elizabeth Feldman, David Goldberg, Ray Schumacher, Nina Stenson and Rickey Watson will go to Group D.

Other attorney moves include the following:
on September 7th, Pauline Houle will go from Group D to Group B; on September 14th, Jeff Victor will return to Group B after assisting Group D during their shortage.

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The following new employees started in Group C on August 17th as office aides, replacing Frances and Florence Dairman who will be returning to college:

Gari Lu Merrill (daughter of Tom Freestone's secretary) graduated from high school this May. She plans to continue her cosmetology studies at night while working at our office during the day.

Erin White (daughter of George Beatty) is another May high school graduate. Erin has office and computer experience from her past employment with Luster Chiropractic and with Foxworth & Galbraith, a lumber company in Texas. ^

BULLETIN BOARD

Save a Tree (or 17)

Our office has been trying to help the environment by collecting aluminum cans (on an informal basis) and by collecting paper (under a formal county program, thanks to Diane Terribile and Joyce Bowman). Now we should consider doing even more!

Concerned attorneys in California are asking their Judicial Council to create court rules that would require most legal papers filed in state court to be printed on paper with at least 10 percent recycled content. The rules also would provide that within five years, attorneys must be printing on both sides of the paper.

These ideas seem logical when you consider that

[] every year, each attorney in the United States uses approximately one ton of paper (and to make one ton of paper requires 17 trees),

[] attorneys are the second largest consumer of paper (after the government).

Recycled paper now is widely available and is comparable to virgin paper in cost and quality. So, perhaps we should start a similar program in Arizona, thereby nullifying the potential war cry of a radical, new conservation movement, "Kill a lawyer, save 17 trees a year." ^

Yesterday . . . (Match the Past)

1. Cindy Tabor (Pretrial)
2. Howard Jackson (Invstgtr.-D)
3. Janet Blakely (Records)
4. Tom Klobas (Group D)
5. Helene Abrams (Appeals)
6. Bob Briney (Admin)
7. Carla Wallace (Group C)
8. Gene Cope (Records)
9. Lisa Gilels (Group A)
10. Hal Brown (Invstgtr.-A)

A. Was on the American Embassy staff in Japan, Venezuela, Mexico and Nigeria
B. Once scored over a quarter of a million points playing Pac-Man
C. Placed first in California and third in nation in Bicentennial Writing Competition
D. 1973 Cribbage champion of the Sea of Okhotsk
E. Worked three years as a machine shop lathe and drill press operator
F. Former #1 seed tennis player at Horizon High
G. Walked the Great Wall of China
H. Has attended 200 Grateful Dead concerts
I. Twice roller-skated into first place in statewide charity competition
J. Worked way through college in a museum cataloging foraminifera

ANSWERS:

1.I; 2.A; 3.E; 4.J; 5.G; 6.B; 7.C; 8.F; 9.H; 10.D